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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BELLARAE AVERY,

Defendant and Appellant.

A144657

(Sonoma County
Super. Ct. No. SCR-640781)

Defendant Bellarae Avery pleaded no contest to identity theft, receipt of stolen property, and possession of a fraudulent access card after she defrauded her employer.¹ In this appeal, she challenges one item in a postjudgment order for victim restitution: \$188.04 for “falsified bereavement pay.” She contends that this award (1) was not related to any of the charged crimes and (2) lacked a factual basis. We agree with her first contention and therefore reduce the restitution award by \$188.04.

I.

FACTUAL AND PROCEDURAL
BACKGROUND

In the spring of 2013, Avery began working for North Bay Office Investments (North Bay), a family-owned-and-operated business.² When Avery was hired, North

¹ On its own motion, this court took judicial notice of the appellate record in Avery’s abandoned appeal from her underlying convictions, *People v. Avery*, case no. A143492.

² The facts in this section are drawn in part from the probation report in the prior appeal. North Bay is now known as “Lennell Property Investments, LLC,” but we will refer to it as “North Bay” for clarity.

Bay's controller, Kathy Witty, was ill with cancer. Avery assumed Witty's bookkeeping responsibilities, and Witty died soon thereafter.

North Bay eventually discovered that Avery had made at least 20 fraudulent purchases on two bank cards. One card belonged to Witty and the other belonged to Witty's brother, a co-owner of North Bay. Witty's brother stated that Avery did not have permission to possess or use his card and that Witty could not have given permission to use hers since she was deceased by the time the purchases were made. Avery also forged a signature on a check for services that were never performed.

In September 2013, North Bay terminated Avery and reported her fraud to the Santa Rosa police, who discovered that she was on probation. A subsequent search of her home uncovered a driver's license with her personal information but an invalid number, numerous copies of the California state seal, copies of blank social security cards, three metal cards issued by the Social Security Administration with two different social security numbers, and documents belonging to Witty and her sister. Police also found Witty's niece's newly issued driver's license, which had been mailed to North Bay.

The Sonoma County District Attorney charged Avery with seven felonies. She pleaded no contest to a count of identity theft, arising from her using Witty's bank card without authorization; receipt of stolen property, arising from her possession of Witty's niece's driver's license; and possession of a fraudulent access card, arising from her fraudulent purchases while employed by North Bay.³ The remaining counts—check fraud, making a counterfeit state seal, possessing a counterfeit social security card, and another count of identity theft—were dismissed.⁴

³ The charges to which Avery pleaded no contest were brought under Penal Code sections 530.5 (identity theft), 496, subdivision (a) (receipt of stolen property), and 484g (possession of fraudulent access card). All further statutory references are to the Penal Code.

⁴ The dismissed counts were brought under sections 470, subdivision (a) (check fraud), 472 (counterfeit state seals), 475, subdivision (a) (counterfeit social security cards), and 530.5 (identity theft).

The trial court sentenced Avery to a total term of five years and four months in county jail, composed of a term of two years in a separate pending case, a consecutive term of eight months for identity theft, concurrent terms of two years for receipt of stolen property and possession of a fraudulent access card, and a consecutive term of two years, eight months in the case for which she was previously placed on probation.⁵ The court suspended the last four months and ordered them served on mandatory supervision.

After sentencing, the trial court held a hearing to consider the People's request for \$37,927.20 in direct restitution to North Bay. Avery did not contest \$13,720.16 of the request but challenged six of North Bay's claimed losses. The court sustained her challenges to five of them, totaling \$24,019, because it found that they were "not directly related to the crime." The court therefore awarded \$13,908.20 to North Bay.

In ordering restitution, the trial court did, however, make an award for the sixth contested item, \$188.04 paid to Avery for bereavement leave after she represented that her father had died.⁶ In addressing this payment, the prosecutor cast doubt on whether Avery's father had actually died and claimed that the bereavement pay was not warranted. Avery's trial counsel responded that the bereavement pay was never identified as a loss in the police reports and that Avery said her father did die. The court observed that "there's never been any proof one way or the other" as to whether Avery's father had died, but it did not explain why it decided to compensate North Bay for this expense.

⁵ Avery was given a local prison sentence under section 1170, subdivision (h). The receipt-of-stolen-property offense was later reduced to a misdemeanor under Proposition 47, and the corresponding concurrent term was reduced to one year.

⁶ In issuing its order, the trial court did not mention the bereavement pay specifically, but \$188.04 represents the difference between the amount Avery contested and the amount the court struck.

II.

A. General Legal Standards.

We begin by discussing our standard of review and the general legal principles governing direct restitution awards. “It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” (§ 1202.4, subd. (a)(1).) When “a victim . . . suffer[s] economic loss as a result of the defendant’s conduct,” the defendant must “make restitution to the victim . . . in an amount established by court order, based on the amount of loss claimed by the victim . . . or any other showing to the court.” (§ 1202.4, subd. (f).) All economic losses for which restitution is sought must be proven by a preponderance of the evidence. (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.)

When probation is denied and a prison term is imposed, restitution is generally limited to the economic losses “caused by the criminal conduct for which the defendant sustained the conviction.”⁷ (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1050; cf. *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121-1122.) In determining whether a victim’s loss was the “result of the defendant’s conduct” (§ 1202.4, subd. (f)), “California courts have adopted the ‘substantial factor’ test for analyzing proximate cause.” (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1396.) Under this test, the court may award direct restitution only where the conduct for which the defendant was convicted was a substantial factor in bringing about the victim’s loss. (See *Foalima*, at p. 1396.) A substantial factor is one that is “ “ “more than negligible or theoretical.” ’ ” (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1321.)

⁷ As part of a plea bargain, a defendant may agree that the trial court can consider facts underlying dismissed counts when determining restitution. (*People v. Weatherton* (2015) 238 Cal.App.4th 676, 678, discussing *People v. Harvey* (1979) 25 Cal.3d 754.) Neither party has addressed whether Avery entered a valid *Harvey* waiver, however, and we limit our analysis to the crimes of which she was convicted.

We review a trial court's determination that a claimed loss was the result of the defendant's conduct for an abuse of discretion. (See *People v. Holmberg, supra*, 195 Cal.App.4th at pp. 1320-1321.) In doing so, we ask “ ‘whether the ruling “falls outside the bounds of reason” under the applicable law and the relevant facts.’ ” (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) It is an abuse of discretion for a court to award restitution when there is no relationship between the defendant's crimes and the economic loss claimed by the victim. (See *People v. Woods, supra*, 161 Cal.App.4th at pp. 1048-1050, 1052, 1054 [reversing restitution award for economic losses stemming from murder for which defendant was convicted only of being accessory after the fact].)

B. The \$188.04 Restitution Award for “Falsified Bereavement Pay” Was Improper Because this Pay Was Unrelated to the Crimes of Which Avery Was Convicted.

Avery contends that the trial court erred by ordering restitution for “falsified bereavement pay” because the claimed loss was not related to her crimes. We agree, and as a result, we need not address her separate contention that the court lacked a sufficient factual basis for the award.

People v. Lai (2006) 138 Cal.App.4th 1227 is instructive on the required nexus between a victim's loss and a defendant's crimes. There, the defendants were convicted of welfare fraud amounting to over \$200,000 for conduct occurring between January 1985 and February 2000. (*Id.* at p. 1246.) The trial court ordered one of the defendants to pay direct restitution for the amount of fraudulently obtained aid he was proven to have received during the charged period, plus an additional \$11,230 for aid fraudulently acquired years earlier, between September 1980 and March 1983. (*Ibid.*) The Court of Appeal struck the award of \$11,230 because it was not connected to the conduct for which the defendant was convicted. (*Id.* at p. 1249.)

Like that of the defendant in *People v. Lai, supra*, 138 Cal.App.4th 1227, the criminal conduct for which Avery was convicted was not a factor, let alone a substantial one, in causing North Bay's claimed loss from the bereavement pay. The identity-theft count arose from Avery's use of Witty's bank card without authorization, the receipt-of-

stolen-property count arose from Avery's possession of Witty's niece's driver's license, and the count of possession of a fraudulent access card arose from Avery's fraudulent purchases during her period of employment. The record lacks any indication that Avery's receipt of the \$188.04 in bereavement pay was related to or in any way enabled by her fraudulent use of bank cards or possession of the driver's license. As a result, the trial court erred in ordering restitution for this payment.

The Attorney General points to the trial court's comment when awarding restitution that Avery committed "phenomenal fraud" and notes that Avery had access to North Bay's computer systems during her time at the company, implying that she could have easily falsified her bereavement pay. This alone does not, however, establish any connection between the bereavement pay and her crimes. Even if we assume that Avery did fraudulently obtain bereavement pay, we would still have to conclude that the trial court improperly awarded direct restitution for the pay because the economic loss was not caused by any of the conduct underlying the convictions.

Claiming that the restitution award reflects a distinction "between financial losses stemming from [Avery]'s falsification of her qualifications," for which the trial court did not award restitution, and Avery's "fraudulent behavior on the job," for which the court did award restitution, the Attorney General argues that the court was not required to award an amount precisely equal to the losses in the latter category. In making this argument, the Attorney General relies on *People v. Petronella* (2013) 218 Cal.App.4th 945, in which the defendant was convicted of underpaying premiums to the State Compensation Insurance Fund (SCIF), a quasi-governmental entity that provides workers' compensation insurance. (*Id.* at p. 951.) The trial court rejected the SCIF underwriting manager's calculations of the estimated loss and awarded restitution in an amount well below the manager's calculations. (*Id.* at p. 967.) The Court of Appeal remanded the case for a new restitution hearing, concluding that "a more accurate calculation of the actual premiums owed . . . was likely impossible" given the number of records and employees. (*Id.* at p. 973.) Here, in contrast, the issue is not whether the bereavement-pay award was properly calculated but whether it was based on a

recoverable economic loss at all. In our view, it is unreasonable to suppose that the extra \$188.04 awarded was based on something other than bereavement pay. The record reflects that the court used the itemized list submitted by the People to calculate its award, and the total award differs from Avery's uncontested amount by the *exact* amount of the bereavement pay. *Petronella* is therefore inapposite.

Finally, even if the bereavement pay had been connected to the conduct underlying Avery's convictions, we would question whether the People presented enough evidence to establish that North Bay suffered a loss. Although we recognize that "[s]ection 1202.4 does not, by its terms, require any particular kind of proof," it does require *some* proof. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542-1543.) Here, however, there is no proof that Avery falsely claimed the bereavement pay. Even if Avery had the opportunity to falsify her bereavement pay because she had access to North Bay's computer systems, there is no evidence that her father did not die or that the pay was otherwise falsely obtained. We are unwilling to infer, as the Attorney General would have us do, that Avery falsely claimed this pay based only on the fact that she committed other fraudulent acts while at North Bay. (See *People v. Holmberg, supra*, 195 Cal.App.4th at pp. 1324-1326 [restitution award reduced because court unwilling to infer defendant stole Ethernet cables from victim, even though defendant stole computers, monitors, and similar equipment].)

III. DISPOSITION

The March 17, 2015 restitution order is modified by reducing the award to Lennell Property Investments, LLC from \$13,908.20 to \$13,720.16. As so modified, the order is affirmed.

Humes, P.J.

We concur:

Dondero, J.

Banke, J.